STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

Docket # 97-90

April 2, 1997

VIA FEDERAL EXPRESS

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. , Room 222
Washington, D.C. 20036

[redacted]

Re: CC.Docket No. CCB/CPD 97-12

Dear Mr. Caton:

Enclosed you will find an original and four copies of **COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON PETITION FOR DECLARATORY RULING AND CONTINGENT PETITION FOR PREEMPTION ON INTERCONNECTION COST SURCHARGES.**

Also enclosed is one additional copy to be conformed and returned to me in the enclosed self-addressed envelope.

Thank you for your attention to this matter. If you have any questions, please call me at (415) 703-1952

Sincerely,

Mary Mack Adu

Mary Mack Adu
Attorney for the People of the
State of California and the Public
Utilities Commission of the State
of California

MMA:nas

Docket #97-90

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling and	)	CCB/CPD 97-12
Contingent Petition for Preemption	)	
On Interconnection Cost Surcharges.	)	

COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON PETITION FOR DECLARATORY RULING AND CONTINGENT PETITION FOR PREEMPTION ON INTERCONNECTION COST SURCHARGES

I. INTRODUCTION AND SUMMARY

The People of the State of California and the Public Utilities Commission of the State of California (California or CPUC) hereby respectfully submit these comments to the Federal Communications Commission (Commission or FCC) on the Petition for Declaratory Ruling and Contingent Petition for Preemption on Interconnection Cost Surcharges. The CPUC's comments focus on one specific issue: the potential preemption of ***any*** state's ability to recover implementation costs.

US West does not provide service as an incumbent local exchange carrier (ILEC) in California, therefore the CPUC will not comment on the substantive aspects of US West's filings in the fourteen states that it serves. These comments

will be limited to the Petition by Electric Lightwave, Inc., McLeod USA Telecommunications Services, Inc. and NEXTLINK Communications (Petitioners) requesting that the FCC preempt ***any*** state that allows the recovery of implementation costs similar to the Interconnection Cost Adjustment Mechanism (ICAM) surcharges proposed by US West. Our comments will show how such wholesale preemption could adversely impact competition in California and illegally intrude in California's lawful authority over intrastate telecommunications matters, as guaranteed by section 2(b) of the 1934 Communications Act, and left intact by the Telecommunications Act of 1996.

II. THE CALIFORNIA EXPERIENCE

Since December 1994, the CPUC has been establishing procompetitive policies and rules that have opened the local telephony market to competition. California's efforts have attracted the interest of many potential competitors, nearly 80 of which have certificates. At that time, the CPUC adopted a procedural plan to open all telecommunications markets within California to competition by January 1, 1997. As part of that plan, on April 26, 1995, the CPUC instituted R.95-04-043/I.95-04-043 (Local Competition Docket) in which interim rules were proposed for local exchange competition within the service territories of Pacific Bell (Pacific) and GTE California (GTEC).[1]

[1] Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local exchange Service; Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service.

In July 1995, the CPUC issued D.95-07-054 which set forth the initial rules for the competitive provision of local exchange service and set January 1, 1996 as the date for facilities-based competition to commence. Resale competition was set to follow in March 1996. Decision (D.) 95-07-054 also established a procedure for certificating both resellers and facilities-based carriers that wanted to provide local exchange service in California.

The Local Competition docket has addressed a number of issues relating to the provision of competitive local exchange service and has adopted rules relating to physical interconnection of networks, resale, interim number portability, and a myriad of other issues relating to the implementation of local competition.

III. California's Treatment of Implementation Costs

By Administrative Law Judge (ALJ) Ruling of August 18, 1995, and Assigned Commission Ruling (ACR) dated October 26, 1995, parties to the local competition docket were directed to address the recovery of costs incurred by incumbent LECs (ILECs) for implementing local competition. Pacific and GTEC both filed estimates of their projected implementation costs. The two companies provided estimates for such elements as: interconnection, data exchange, number portability, OSS, and resale. Pacific's estimate was about $32 million, while GTEC's was slightly over $7 million.

In D.96-03-020, the CPUC indicated that it did not intend to give advance approval of the estimated implementation costs submitted by Pacific and GTEC

because it would send an inappropriate signal to the ILECs. Guaranteed preapproval would negate ILEC incentives to implement competition in the most efficient way possible. While the CPUC denied the ILECs' request for advance approval of estimated costs, the CPUC's decision did leave the door open for future recovery of actual documented costs in the following manner:

> We recognize, however, that the LECs will need to perform various activities as outlined in their testimony to implement the infrastructure for local exchange competition and that some level of costs will be incurred by the LECs associated with these activities. Moreover, we expect society as a whole to benefit from the implementation of local exchange competition. Accordingly, we conclude that reasonably incurred costs to implement competitive local exchange service are appropriate, and it is not unreasonable that end-users pay for such costs.[2]

The CPUC went on to state that it would consider establishing an end-user surcharge for "certain reasonably incurred implementation costs" at a later date when more reliable cost data would be available for review.[3] Any such surcharge would be assessed in a nondiscriminatory manner on all end-user customers of both ILECs and CLCs. The ILECs would have the burden of proof that any implementation costs they would seek to recover were in the public interest and consistent with CPUC policy for establishment of end-user surcharges.

D. 96-03-020 also authorized Pacific and GTEC to establish memorandum accounts to record actual implementation costs and ordered the companies to file a

[2] D.96-03-020, p. 90.
[3] D.96-03-020, p. 91.

report by January 1, 1997, providing the balance in the memorandum account broken down by major categories. The ALJ was directed to review the issue of implementation costs at a later phase of the local competition proceeding, and the CPUC summarized its viewpoint as follows: "The LECs are placed on notice that they will be responsible for justifying the reasonableness and consumer benefits of any amounts which they seek to recover through an end-user surcharge. We will not guarantee or preapprove recovery of any implementation costs at this time."[4] The ILECs have made the required filings, and the assigned ALJ will set a schedule to address the issue of the recovery of implementation costs.

Hence, the CPUC has not signed a blank check for ILECs to recover implementation costs associated with local competition. Rather, the CPUC has set up a process whereby CPUC staff and interested parties will have an opportunity to scrutinize ILEC filings of actual expenses incurred in implementing competition and provide input to the CPUC on the reasonableness of particular costs, to assist the CPUC in its decisionmaking role.

IV. CPUC's Treatment of Prior Implementation Costs

The CPUC previously dealt with the issue of implementation costs in its Implementation Rate Design (IRD) decision.[5] The IRD proceeding expanded competition within the state's Local Access and Transport Areas (LATAs) by

[4] D.96-03-020, pp. 90-91.

[5] *In the Matter of Alternative Regulatory frameworks for Local Exchange Carriers., 56 CPUC 2d 117 (1994) , D.94-09-065 in I. 87-11-033.*

authorizing competition for intraLATA toll service and other services. At the core of IRD was a rate design which allowed the CPUC to balance rate reductions for competitive services with increases in basic rates and other services. After a thorough review of various types of implementation costs requested by the ILECs, the CPUC granted recovery, as part of the rate design, of only those recurring implementation costs related to intraLATA toll.

In the IRD decision, the CPUC denied recovery of all other types of implementation costs—specifically, capital costs and nonrecurring costs—and also denied recovery for competitive losses. The latter were denied on the rationale that such recovery was inconsistent with the ratepayer safeguards and ILEC incentives established in the California incentive regulation program for Pacific and GTEC. The CPUC further noted that the ILEC competitors in the intraLATA toll market had no captive markets to provide a steady revenue stream if they were inefficient. These IRD implementation costs were recovered in a nondiscriminatory manner through a combination of changes to the rate design and the end-user surcharge.

V. THE IMPACT OF THE PETITION ON CALIFORNIA'S POLICY

Electric Lightwave, Inc., McLeodUSA Telecommunications Services Inc., and NEXTLINK Communications, L.C.C., as Petitioners, request the Commission to issue an order declaring that the initial costs incurred by ILECs to meet the

statutory requirements of the Telecommunications Act of 1996 are not recoverable through state imposed surcharges on either competitors or end-users.

The CPUC believes the FCC should allow states the option to deal with the issue of implementation costs for local competition based on actual knowledge of expenses incurred by local companies and a thorough analysis of the ILEC filings by state staff and competitors. In the case of US West, the FCC should allow the fourteen states to deal with US West's filings on the merits of those filings, using the states' own procedural processes. States are in the best position to make a determination of the validity of cost recovery. If the FCC decides to preempt states on implementation costs, the FCC, like any other regulatory entity, will have to evaluate the merits of both the ILECs' claims that costs were reasonably incurred to meet the 1996 Act and the competitors' claims that such costs are not recoverable. This analysis will surely require the FCC to address the issue of takings.

VI. CONCLUSION

For all of the above reasons, the CPUC is opposed to an FCC order that grants the Petition. The CPUC has an established track record of thoroughly reviewing ILEC requests for implementation costs and acting to approve only those that are appropriate in a particular circumstance. When allowing implementation cost recovery, the CPUC has designed recovery mechanisms that are nondiscriminatory. The FCC should not act to deny California the right to

make a determination as to which ILEC costs of implementing local competition are recoverable and the methods of recovery. California is in the best position to make that determination for the ILECs that operate within its boundaries.

An order which preempts lawful state authority over intrastate matters within the state's jurisdiction will not foster comity and cooperation between state and federal governments. Rather, such an order could lead to more litigation that could impede competition and defeat the goals of the 1996 Act. This should be avoided if at all possible.

Respectfully submitted,

PETER ARTH, JR.
LIONEL B. WILSON
MARY MACK ADU

By: 

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April 2, 1997

CERTIFICATE OF SERVICE

I, Mary Mack Adu, hereby certify that on this 2nd day of April, 1997, a true and correct copy of the foregoing in **COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON PETITION FOR DECLARATORY RULING AND CONTINGENT PETITION FOR PREEMPTION ON INTERCONNECTION COST SURCHARGES** was mailed first class, postage prepaid to all known parties of record.

Mary Mack Adu

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